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Supreme Court of the United States

October Term, 1972.

No. 72-1641

GEOFFREY MICHAEL AVERY,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1972

No. .

GEOFFREY MICHAEL AVERY
Petitioner

versus

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Geoffrey Michael Avery, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case entered March 20, 1973, rehearing denied May 8, 1973, appended hereto. An opinion of the United States District Court for Middle District of Florida in this case is also appended.

JURISDICTION

The judgment sought to be reviewed was dated and entered March 20, 1973, rehearing denied May 8, 1973. Jurisdiction of this Court is invoked under 28 USCA sec 1254(1).

QUESTION PRESENTED

Whether or not the decision of this Court in *Welsh v United States,* 398 US 333, 26 L Ed 2d 308, 90 S Ct 1792, applies retroactively so that a conscientious objector on moral and ethical (but not on "religious" grounds) who, prior to *Welsh,* did not present his claim to be a conscientious objector on such grounds and thereafter was classified 1-A and refused induction, may at his post-*Welsh* trial defend his refusal to submit to induction on the ground that he is entitled to a conscientious objector classification under the statutory phrase "by reason of his religious training and belief" as that phrase is construed by the *Welsh* decision.

(Petitioner answers the question in the affirmative)

FEDERAL STATUTE INVOLVED

50 USC App. sec 456 (j), a section of the Military Selective Service Act of 1967 reads, in its pertinent part, as follows:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosphical views, or a merely personal moral code . . ."

STATEMENT OF THE CASE

Geoffrey Michael Avery claims to be a bona fide conscientious objector to war in any form on grounds which he deems to be moral and ethical but not "religious." His claim has never been passed upon by his draft board or a court, for reasons hereafter stated, but the District Court for the Middle District of Florida has found as a fact that the evidence

> "demonstrates a non-frivolous claim to such status, under post-*Welsh* standards." (A-7)

The printed forms and instructions from his local draft board which he received and followed referred only to conscientious objection based on "religious" grounds and to the statutory phrase "religious training and belief." Relying on these forms and instructions petitioner understood that conscientious objector status was not grantable to him and accordingly he made no application therefore. In due course he was classified 1-A and ordered to report for induction into the military on May 6, 1970. He disobeyed the order because of his conscientious objection to war in any form.

One month later on June 15, 1970, this Court decided *Welsh, supra,* holding that the words "religious training and belief" as used in the draft law concerning conscientious objectors included solely moral or ethical beliefs, even though the registrant himself may expressly characterize them as not "religious."

On June 19, 1971, an indictment was returned against petitioner for his failure to report for induction on May 6, 1970. At his trial he raised the defense that prior to *Welsh* neither he nor his draft board understood that the phrase "religious training and belief" included purely

moral and ethical beliefs which the registrant himself did not consider to be "religious," that he had relied upon the printed forms and information supplied him by his draft board and had not claimed to be a conscientious objector on those non-"religious" grounds.

The district court, following the decision of the Fifth Circuit in *US v Taylor* (CA 5, 1971), 448 F 2d 349, overruled the defense and convicted him (A 9). On appeal his conviction was affirmed on the same authority (A 2), although petitioner had pointed out on petition for rehearing that *Taylor* directly conflicted with the decision of the First Circuit in *US v Fargnoli,* (CA 1, 1972), 458 F 2d 1237. (A 3).

BASIS OF FEDERAL JURISDICTION

The basis of federal jurisdiction is petitioner's alleged violation of the draft law, in particular the penalty section, 50 USC APP, sec 462(a).

ARGUMENT

The Supreme Court should grant certiorari to resolve the conflict between the decision in this case, which follows the Fifth Circuit precedent in *US v Taylor, supra,* and the contrary decision of the First Circuit in *US v Fargnoli, supra.*

Of course, it is petitioner's position that the *Fargnoli* rule is the proper and better one but that argument is properly reserved for petitioner's brief on the merits. It is noteworthy that the refusal of the Fifth Circuit in *Taylor* to review that decision en banc was accompanied

by written dissents by three judges, as many as the number who were responsible for the original opinion which the court declined to consider en banc.

GARDNER W. BECKETT, JR.

Of Counsel for Petitioner
Geoffrey Michael Avery

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52 Sixth Street South
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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3716

Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEOFFREY MICHAEL AVERY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(March 20, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: Geoffrey Michael Avery was convicted of knowingly and wilfully failing and refusing to perform a duty required of him by law, that is, he

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*Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

failed and refused to report to Local Board #30, St. Petersburg, Florida, in violation of §462(a), Title 50 App., United States Code.

The appellant now claims that although he made no effort of any kind whatever to assert such a status he should have been entitled to a conscientious objector classification.

The appeal falls squarely within the decision of this Court in *United States v. Taylor*, 5 Cir., 1971, 448 F.2d 349.

Consequently, the judgment of the District Court is

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3716

UNITED STATES OF AMERICA

Plaintiff-Appellee

versus

GEOFFREY MICHAEL AVERY

Defendant-Appellant

PETITION FOR REHEARING EN BANC

GEOFFREY MICHAEL AVERY, the defendant-appellant, respectfully moves the Court to grant a rehearing en banc and reconsider its opinion and judgment dated and entered March 20, 1973, on the following grounds:

1. The present decision and the decision in *US v Taylor* (CA5, 1971), 448 F 2d 349, the precedent for the present decision, directly conflict with the decision of the First Circuit in *US v Fargnoli* (CA1, 1972), 458 F 2d 1237.

2. The *Fargnoli* case was not discovered or presented to the Court by either party until after the present decision had been made.

I CERTIFY that two copies of this petition have been served upon counsel of record for appellee this 29th day of March, 1973.

GARDNER W. BECKETT, JR.

Of Counsel for Defendant-Appellant

NELSON, BECKETT, NELSON & THOMAS
52 Sixth Street South
St. Petersburg, Florida 33701

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3716

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GEOFFREY MICHAEL AVERY,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion March 20, 1973, 5 Cir., 1973, ____ F.2d ____).

(May 8, 1973)

Before GEWIN, COLEMAN and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the

Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

United States District Court
Middle District of Florida
Tampa Division

UNITED STATES OF AMERICA)

v.) CASE NO.

GEOFFREY MICHAEL AVERY) 71-146-Cr-T.

(Filed Tampa, Fl., Dec. 5, 1972, Wesley R. Thies, Clerk)

FINDINGS OF FACT

The Court finds as facts that:

1. The defendant was a person registered, as required by law, with Local Board No. 30, St. Petersburg, Florida, and subject to such lawful orders as the board might issue.

2. The defendant was classified in Class 1-A by said board, available for military service.

3. At no time on or after his registration did the defendant either request that he be placed in some classification other than 1-A, or in any manner present to his local board any fact or facts that, if true, would warrant his being placed in any classification other than 1-A.

4. The defendant was regularly ordered by said local board to report on May 6, 1970, for induction into military service.

5. On May 6, 1970, the defendant knowingly and wilfully failed and refused to report as ordered for induction, and has continued to refuse induction at all times subsequent thereto.

6. At the time of his refusal to report, and for many years prior thereto, down to the date of trial, the defendant considered himself to have a conscientious objection to war based on what he deems to be moral and ethical grounds but does not consider himself a conscientious objector on "religious" grounds.

7. On June 15, 1970, one month after the defendant had disobeyed his induction order, the United States Supreme Court decided ***Welsh*** v. ***United States,*** 398 U.S. 333 (1970) which interpreted the words "religious training and belief" as used in the law concerning conscientious objectors to include "solely moral or ethical beliefs, even though the registrant himself may . . . expressly characterize them as not 'religious.' "

8. The defendant communicated with his local board, Local Board No. 30, completing and returning to the Board the standard Selective Service forms which the Board from time to time requested him to complete and return, all of which are in evidence in this case.

9. Both parties, including the defendant, have urged that this Court is not required to decide as a matter of fact or law whether or not the defendant would qualify as a conscientious objector, under either pre-***Welsh*** or post-***Welsh*** standards. Agreeing that it is not necessary to determine whether the defendant could qualify for conscientious objector status at any time, had he properly applied therefor, this Court makes no such determination, except that it finds as a fact that, at the least, the defendant's evidence demonstrates a non-frivolous claim to such status, under post-***Welsh*** standards. The defendant made a unilateral determination without consultation with anyone that he did not qualify for I-O status under pre-***Welsh*** standards. The Court determines that whatever may be

the defendant's beliefs, they were held for many years prior to his registration with Local Board No. 30.

10. The defendant made no claim to the Local Board or any governmental authority till on or about March 1, 1972, almost two years following his refusal to report for induction and a year following the return of the indictment of this case, at which time the defendant claimed that he qualified for conscientious objector status under post-*Welsh* standards, such claim being made in an affidavit attached to a Motion in the present case.

11. On or about September 23, 1968, the defendant completed and returned the Selective Service System Form 100, "Classification Questionnaire," which form is in evidence as part of the defendant's Selective Service file. This form, "Series VIII-Conscientious Objector," makes provision for a registrant to assert his classification as a conscientious objector by reason of his "religious training and belief." Defendant did not claim to be a conscientious objector by so indicating on Form 100. He never requested any other form and never sought any additional information from the Local Board.

12. The defendant's exhibits of the official forms and documents submitted in evidence need not be reviewed here, inasmuch as they speak for themselves, insofar as they are directed toward the obtaining of conscientious objector status and the basis for such status.

CONCLUSIONS OF LAW

The defendant asserts that the order for his induction is invalid. He contends that the use of he language "religious training and belief" in the basic Classification Questionnaire (S.S.S. Form #100) constituted misleading action by the Selective Service System depriving him of the right to present to his local board a claim for classifica-

tion as a conscientious objector. The language claimed to have been misleading is identical to that then used on the Special Form for Conscientious Objectors (S.S.S. Form #150), which the defendant did not request or receive. The Court is of the opinion that this contention is controlled by *United States* v.*Taylor,* 448 F.2d 349 (5th Cir. 1971), in which the same contention, with respect to S.S.S. Form #150, was rejected by the Court of Appeals.

Whatever distinctions can be drawn between the facts in *Taylor* and those in this case do not aid the defendant. In *Taylor,* the registrant had demonstrated, by requesting Form #150, that he was, at least, considering a possible claim of entitlement to classification as a conscientious objector. The defendant here did not give even that much notice to his local board of the possibility that he might seek some classification other than 1-A. It is the registrant's duty to present information to his local board demonstrating his entitlement to a classification lower than that given to him. The record in his case, including he defendant's Selective Service records, is barren of any indication that the defendant's local board could reasonably have acted in any way toward him other than as it did, or could reasonably have placed him in any class other than 1-A.

Accordingly, the Court concludes that the order of the local board directing him to report for induction on May 6, 1970 was lawful and valid in all respects, and that the defendant is found guilty as charged.

DATED this 1st day of December, 1972.

/s/ Paul H. Roney

UNITED STATES CIRCUIT JUDGE
SITTING AS A DISTRICT JUDGE

APPENDIX

Exhibit A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29198

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAPE HOLLEY TAYLOR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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(June 2, 1971)

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: Appellant Taylor was convicted for refusing to submit to induction into the armed services in violation of 50 U.S.C. App. § 462(a). On appeal he contends that his local Selective Service Board gave him mis-

information which caused him to refrain from making an application for conscientious objector status prior to the date on which he was to report for induction. We affirm his conviction.

The background facts are these: Following graduation from high school, Taylor on December 4, 1967, was given a 2-S student deferment for one year while he attended California Institute of Technology.[1] This classification was changed to 1-A (Available for Service) on November 14, 1968, when Taylor became ineligible for student deferment by accepting full time employment. Upon termination of his student deferment Taylor went to his draft board on December 16, 1968 where he requested and received Selective Service Form 150 (Application Form for Conscientious Objector Classification). The form, which quoted statutory language, stated that his conscientious objector request must be founded on a "religious belief." Because appellant had no conventional religion, he asked the board secretary, Mrs. Duncan, whether the requirement would be interpreted literally. Mrs. Duncan replied that such a question must be answered by the Board. Mrs. Duncan also advised Taylor that he had 30 days in which to return this form executed in full. Taylor took the form home with him but asserts that he subsequently decided that he could not conscientiously sign it because he did not have a religious belief in the traditional sense.

On April 24, 1969, the Board ordered Taylor to report for induction on May 16, 1969. Taylor did not report as ordered; instead he mailed a letter to the Board from Boston, Massachusetts (his local board was in Gainesville, Florida) stating that he would refuse induction for consci-

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[1]On his initial questionnaire Taylor wrote "NA" (not applicable) in the section entitled "Series VIII. — Conscientious Objector."

entious reasons.[2] Prior to that time Taylor made no formal effort to assert a conscientious objector claim. The Conscientious Objector Form which he procured from the Board was never filled in and returned.[3]

Appellant's major contention is that he was misled by SSS Form 150 into thinking that it would be not only fruitless

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[2]

Local Board # 17
Federal Building
Gainesville, Florida
33601

"Dear Sirs,

It is my belief that war is wrong. Men must learn to get along with each other; they must not solve their differences by killing. I believe that the situation in the world today in which people are so afraid of each other that the military is the largest part of our government is wrong. However, my beliefs are not based upon any conventional religious upbringing, but upon my moral upbringing and personal observation and reading of people and society. Because of these beliefs, I requested conscientious objector status, and was given Form 150, I believe, to fill out and sign. This form stated that one's moral beliefs and personal philosophy were not sufficient grounds for requesting Conscientious Objector status; only religious opposition was acceptable. For this reason, I was unable to complete and sign this form, which I believe discriminates against me. I was also unable to follow instructions to either return form 150 or renounce my claim because I did not want to renounce my claim entirely. I am now, scheduled for induction on May 16. I plan to refuse induction, but would gladly do an appropriate alternate duty. I am now in Boston on a job-related trip, and will return to Gainesville on May 18 to face whatever action is deemed appropriate.

Sincerely,
Jape Holley Taylor
8-17-49-400."

[3]On cross-examination Taylor testified as follows:

Q. Mr. Taylor, you said you didn't sign the application for CO, what do you think the Board was going to pass on if you didn't put something before them?
A. I don't know.
Q. In other words, if the Board had nothing to go on did you know you had a right to appeal if they turned you down on your objection status?
A. Yes, sir.
Q. You didn't fill out the Conscientious Objector questionnaire there and you wrote a letter back and you didn't send it back to them so they had nothing at all before them, the draft clerk to present to the Board, did they?
A. That's right.

but also unconscionable for him to seek conscientious objector status; as a result he claims that he was deprived a full opportunity to pursue an available classification. It is true that SSS Form 150 does not mention or suggest the very broad construction of the requirements for conscientious objector religious requirements as interpreted by the Supreme Court in *United States v. Welch*,[4] and *United States v. Seeger*.[5] In this regard it could be argued that the old Form 150 possibly did leave some questions unanswered.[6] Nevertheless, the evidence in this case is undisputed that appellant acting unilaterally decided on uncounselled, subjective information that he could not qualify.[7] Although cases exist where misleading government activity or information constitutes a good defense to a criminal charge,[8] more is required than a bald assertion that the defendant was as a subjective matter misled, and that his subsequent action resulted from his mistaken belief. As the court stated in *United States v. Lansing*:[9]

> When a defendant claims, as does appellant here, that his criminal conduct was the result of reliance on misleading information furnished by the government, society's interests in the uniform enforcement of law

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[4]398 U.S. 333 (1970).

[5]380 U.S. 163 (1965).

[6]Cf. Gillette v. United States, ___ U.S. ___, 28 L.Ed.2d 168 (1971)

[7]In United States v. Powers, 413 F.2d 834, 837 (1st Cir. 1969) the court observed:

> Were unilateral, subjective, uncounselled misunderstanding of a Selective Service requirements and definitions to b a defense to prosecution, an already laboring vehicle would in all likelihood be completely immobilized.

[8]See: United States v. Lowell, 437 F.2d 906, 907 (9th Cir. 1971); United States v. Bagley, 436 F.2d 55 (5th Cir. 1970). United States v. Williams, 420 F.2d 288 (10th Cir. 1970); United States v. Bryan, 263 F. Supp. 895 (N.D. Ga. 1967).

[9]424 F.2d 225 (9th Cir. 1970).

> requires at the very least that he be able to show that his reliance on the misleading information was reasonable – in the sense that a person sincerely desirous of obeying the law would have accepted this information as true, and would not have been put on notice to make further inquiries.[10]

Under the facts and in the circumstances of this case, we are convinced that Taylor acted unreasonably. Taylor testified that he interpreted the language of the form to mean that some formal or conventional religious basis was required for a conscientious objector classification, yet he made no real effort to ascertain the actual requirements for the classification despite the ready availability of information and advice at the local board. Following the example of the First Circuit Court of Appeals in *United States v. Powers*,[11] we take judicial notice of the fact that a registrant's Notice of Classification, which is required to be in his personal possession at all times, plainly advises registrants in capital letters – "For Information and Advice, Go To Any Local Board." Other provisions advise registrants of the availability of Government Appeal,[12] of board members ready "to advise and assist registrants in the preparation of questionnaires and other selective service forms,"[13] and of the "positive information policy" of the Selective Service Board.[14] Moreover, Taylor was specifically advised by Mrs. Duncan at his Board that to obtain the status of conscientious ob-

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[10]Ibid at 227. See: United States v. Wroblewski, 432 F.2d 422 (9th Cir. 1970); United States v. Haseltine, 415 F.2d 334 (9th Cir. 1969).

[11]413 F.2d 834, 837 (1st Cir. 1969).

[12]See 32 C.F.R. § 1604.71.

[13]32 C.F.R. § 1604.41.

[14]32 C.F.R. § 1606.61.

jector he would have to submit a written request within 30 days. When he failed to submit SSS Form 150 within the specified time limit, Mrs. Duncan wrote him on February 17, 1969, to do so at once or else he would waive any claim to the status of conscientious objector.[15] This backdrop of information was certainly sufficient to put a person sincerely desirous of complying with the law on notice that he could have inquired of the board and learned the true status of his claim.[16] Having failed to ask for a reclassification or to press in any way before induction that he should be reclassified, or to provide the local board with any information which could warrant reconsideration of his classification, Taylor cannot now charge the board with unconscionable dereliction in violation of due process of the law. Selective Service Boards cannot be charged with neglect of duty arising out of the secretive, unilateral, uncounselled, subjective and uncommunicated decisions of a registrant based upon his individual ideas and concepts of broad philosophical, moral or religious questions.[17]

Appellant's second contention is that the Board committed error by refusing to reconsider his classification in light of

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[15]Mrs. Duncan wrote to appellant as follows:

Feb. 17, 1969

Dear Sir:

On December 16, 1968 you were issued SSS Form 150. This was to be completed and returned to this office in 30 days. To date this completed form has not been returned. Please return this form at once or sign the statement below and return. Thank you.

Yours truly
FOR THE BOARD
(Mrs.) Reba K. Duncan
Executive Secretary

I hereby withdraw my claim as a Conscientious Objector.
Signed: _____
Registrant

[16]For example, see: United States v. Welch, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965).

[17]See McGee v. United States, — U.S. — (No. 362, May 17, 1971).

his post-induction letter.[18] While courts have exercised discretion in rare and unusual cases in determining whether to consider conscientious objector claims filed after an order to report for induction but before refusal to report,[19] the courts are virtually unanimous in refusing to require boards to recognize post induction claims.[20] As the court said in *Palmer v. United States:*[21]

> Classification functions of the local board cease with induction, and a registrant cannot, by refusing to submit to induction, impose upon the board any new duties respecting reclassification or reopening . . . To permit such imposition would be highly disruptive of the Selective Service process.[22]

The reason for the strict adherence to this rule against consideration of post induction claims was discussed with approval by the Supreme Court in *Ehlert v. United States.*[23]

> A regulation explicitly providing that no conscientious objector claim could be considered by a local

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[18]See note 2.

[19]United States v. Long, 435 F.2d 830 (10th Cir. 1971); United States v. Williams, 420 F.2d 288 (10th Cir. 1970).

[20]United States v. McDuffie, ___ F.2d. ___ (5th Cir. 1971) [No. 29780, May 11, 1971 — slip opinion p. 4]; United States v. Lowell, 437 F.2d 906, 908 (9th Cir. 1971); United States v. Schrader, 435 F.2d 854, 855 (9th Cir. 1971); United States v. Danell, 435 F.2d 834 (1st Cir. 1970); United States v. Collins, 426 F.2d 765, 766 (5th Cir. 1970); United States v. Robley, 423 F.2d 613 (9th Cir. 1970); United States v. Crutchfield, 422 F.2d 399 (4th Cir. 1970); Straight v. United States, 413 F.2d 263 (9th Cir. 1969); Dugsdale v. United States, 389 F.2d 482 (9th Cir. 1968).

[21]401 F.2d 226, 227 (9th Cir. 1968).

[22]Ibid at 227-228.

[23]___ U.S. ___ (No. 120, April 21, 1971). See also: United States v. McDuffie, ___ F.2d ___ (5th Cir. 1971) [No. 29780, May 11, 1971 — Slip Opinion at 4].

At oral argument it was felt that a decision in *Ehlert* would have a substantial bearing on the issues here presented. Accordingly, we delayed our decision until the *Ehlert* opinion was released.

board unless filed before the mailing of an induction notice would, we think, be perfectly valid, provided that no inductee could be ordered to combatant training or service before a prompt, fair, and proper in-service determination of his claim. The Military Selective Service Act of 1967 confers on the President authority "to prescribe the necessary rules and regulations to carry out the provisions of this title. . ." 50 U.S.C. App. § 460(b) (1). To read out of the authority delegated by this section the power to make reasonable timeliness rules would render it impossible to require the submission, before mailing of an induction notice, of a claim matured before that time. The System needs and has the power to make reasonable timeliness rules for the presentation of claims to exemption from service.

A regulation barring post-induction notice presentation of conscientious objector claims, with the proviso mentioned, would be entirely reasonable as a timeliness rule. Selective Service boards must already handle prenotice claims, and the military has procedures for processing conscientious objector claims that mature in the service. Allocation of the burden of handling claims that first arise in the brief period between notice and induction seems well within the discretion of those concerned with choosing the most feasible means for operating the Selective Service and military systems.[24]

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[24]Ibid at 2-3. The instant case is not identical to *Ehlert* because there is no claim of crystallization of belief after the receipt of notice of induction but rather this is a case of late filing of a previously matured conscientious objector's belief. It would appear that a registrant who asserts that his conscientious objector beliefs crystallized after receipt of induction notice would have a stronger case than one who claims to have held such beliefs long before receipt of such notice. See: United States v. Nix, 437 F.2d 746 (9th Cir. 1971).

There was no due process violation in the draft board's refusal to reconsider Taylor's application. The Selective Service Board has no obligation to act upon requests which are made by registrants after the date for his induction has passed.[25] Accordingly, the judgment of conviction is AFFIRMED.

[25]Ehlert v. United States, —— U.S. —— (No. 120, April 21, 1971); Austin v. United States, 434 F.2d 1301 (5th Cir. 1970); United States v. Berger, 434 F.2d 610, 611 (9th Cir. 1970); United States v. Hosmer, 434 F.2d 209 (1st Cir. 1970). See: United States v. Uhl, 436 F.2d 773, 774 (9th Cir. 1970); United States v. Jones, 423 F.2d 636 (4th Cir. 1970); Straight v. United States, 413 F.2d 263, 264 (9th Cir. 1969).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1970

No. 29198

D. C. Docket No. CR 1279

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAPE HOLLEY TAYLOR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 2, 1971

Issued As Mandate:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29198

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAPE HOLLEY TAYLOR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 2, 1971, 5 Cir., 1971, ... F.2d .....).

(August 10, 1971)

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and the Court having been polled at the request of one of

the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing 7n Banc is also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY,
Circuit Judges.

BROWN, Chief Judge, with whom GODBOLD, Circuit Judge, joins, dissenting:

Without now determining what the outcome should be the dissenting opinions reflect that this is a matter of great importance (which the panel recognized as well), and that it is enbancworthy. I dissent from the failure to grant rehearing en banc.

GOLDBERG, Circuit Judge, with whom SIMPSON, Circuit Judge, joins, dissenting:

Conscious of the travail, dedication, and scholarship that went into the writing of the panel's opinion in this case, it was with great reluctance that I requested en banc consideration. Nevertheless, because of the importance of the issues decided and because of my fundamental disagreement with the conclusions reached therein, I felt that en banc ventilation was essential. Now that my request has been rejected, I feel compelled to record my dissent.

Though there is very little that can be said in view of the lucid dissent of my Brother Simpson, an opinion in which I fully concur, my proclivity for verbosity, perhaps, impels me to add the following thoughts. In the first place, I fully sub-

scribe to Judge Simpson's analysis of the front page of Selective Service Form 150, and his conclusion that at best it is "a half truth," and at worst it is "clearly wrong." That Form, devised for an earlier time, cannot be accepted uncritically in this post-*Welsh* and *Seeger* era of Selective Service law. The panel itself admits that the Form may be ambiguous or misleading. While it is true that it is couched in terms of the statute's particular phraseology, it seems unlikely to me that a layman would construe the language to encompass more than conventional religious beliefs. Certainly, the Form does nothing to dispel this rather obvious interpretation. I would think that in this light a registrant would be acting reasonably in relying, without more, on the only explanatory material provided by the Selective Service System. The printed word, after all, has its own talismanic fetishism. Where it has been issued and distributed by the Government and thus bears a governmental imprimatur, it becomes in the hands of the registrant ipse dixit. It would seem to me, then, that the burden should be on the Government to provide sufficient information to rebut and to clarify the otherwise obvious meaning derivable from the words in this Form.

Even if it be assumed that the Form was merely ambiguous and not affirmatively misleading, so that a registrant might have some obligation to investigate, an assumption to which I do not subscribe, I would still disagree with the panel. In the first place, characterizing Taylor's misapprehension as "secretive," "subjective," and "individual," as the panel does in its opinion, is at best irrelevant. Certainly Taylor's conclusion that he could not in good faith fill out the form could be characterized as subjective, but this determination was derived from the ambiguity of the form — an objective source. The real issue then is not the subjectivity of Taylor's mistaken conclusion, but whether such a conclu-

sion was reasonable. The nub of this issue, as the panel notes, is whether or not Taylor acted reasonably and diligently in investigating his entitlement to conscientious objector status. It is at this point that I disagree with the panel, for it seems to me that Taylor clearly acted reasonably. He went to his board to apply for conscientious objector status and met with and asked questions of its only visible representative, the Clerk. Receiving only evasive and ambiguous answers, Taylor conferred with his father, and both determined, quite reasonably it seems to me, that Taylor did not qualify for the exemption. Therefore, thinking that he had no right to a conscientious objector classification under the Selective Service System's rules and regulations, Taylor did not submit Form 150. In Taylor's view to have claimed conscientious objector status when he felt he did not qualify would not only have been an act of bad faith but also an act of futility. The panel, however, exprobrates Taylor for failing to do more. I regret that a felony conviction should turn on a registrant's failure to pursue a series of additional, though obviously, at least to him, futile acts.

SIMPSON, Circuit Judge, with whom GOLDBERG, Circuit Judge, joins, dissenting:

I respectfully dissent from the Court's failure to grant rehearing en banc.

It is my conviction that the Selective Service System Form for making application for conscientious objector status (Form 150) is patently and unreasonably misleading to most registrants. The inference is compelling that this is responsible for causing many registrants with valid CO claims (including the appellant Taylor) to forego applying for such status. The front page of Form 150 reads:

Section 6(j) of the Military Selective Service Act of

1967 provides: "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the Armed Forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board pursuant to Presidential regulations may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

Most registrants are not lawyers. Without guidance "religious training *and* belief" must be understood by them to be used in the conventional sense, that is to say, in addition to belief in a Supreme Being, as including training and membership in and adherence to the beliefs of a formally constituted religious organization. What the forms fails to inform the registrant is that two United States Supreme Court

opinions, *United States v. Seeger*, 1965, 380 U.S. 163, and *Welsh v. United States*, 1971, 398 U.S. 333, have considerably enlarged on the conventional meaning of "religious training and belief", and have held that in some circumstances deeply held personal beliefs not commonly thought of on the street as "religious" may qualify as "religious" within the meaning of the statute. Form 150 not only does not reveal this critical legal development to the layman registrant, but actually appears to indicate a precisely opposite meaning – that deeply held personal beliefs cannot be the basis for a CO claim. At its best, Form 150 is a half truth, and at worst, the information contained therein is clearly wrong. In many areas of the law we recognize that to neglect to reveal a material fact, in effect to tell a half truth, may be as misleading and as culpable as an outright lie. That doctrine fits this situation.

This is not at all to advocate that all court rulings relevant to the Selective Service System must be revealed literally in the forms used. But the information contained on the front cover of Form 150 has been a deceptively misleading half truth since *Seeger* came down, for more than five years. The average registrant may not be expected to keep abreast of Supreme Court rulings. Moreover, the entire emphasis of the Selective Service System at this stage of the process, i.e. classification, is non-legal. Registrants are not allowed to have legal counsel in attendance at a personal appearance before the local board when requesting a classification. Registrants are informed that if they have any *recognizable* legal problems, that the board has a legal advisor who will consult with the registrant upon request. The attitude projected is "You don't need a lawyer because you're in good hands with your square-shooting local Selective Service Board." Further, young registrants, typically age 18 to

26, at least to any significant extent do not have the financial resources to employ lawyers to keep them informed as to recent and relevant Selective Service rulings. For these reasons I would hold the Selective Service System to a strong affirmative obligation of frankness and candor regarding the state of applicable law in its dealings with registrants. Any other standard seems to me shocking in its callousness.

It is a legitimate deduction that the retention of the outdated information on Form 150 nullifies in large part the effect of *Seeger* and *Welsh* This result may be that intended by high officials of the Selective Service System, but it is unnecessary to speculate in this respect. The adverse effect on such registrants as Jape Holley Taylor is the same whether caused by negligence or deliberate deception.

The average registrant whose contemplated CO application is based on other than traditional religious grounds may be expected to study the form uncritically, give the word "religious" its common every day connotation involving organized religion and conclude that he does not qualify for CO status. He is unlikely (and should not reasonably be expected) to research the law to determine whether "religious" has any hidden meaning. Only too late, after he refuses induction, is charged criminally and is provided with counsel, does he learn that he may have had a valid CO claim from the beginning. See for example what happened to Taylor, even though he counselled with his college professor father. People of this sort are not criminals. Instead they are the innocent victims of outdated procedural forms.

This case is not an isolated instance. In the past few months this Court has been faced with similar problems created by misinformation given to a registrant by his draft board or its clerk. See, e.g., *Edwards v. Selective Service Local Board No.*

111, 5 Cir. 1970, 432 F.2d 287, *U.S.A. v. Ray Austin Bagley*, 5 Cir. 1970, 436 F.2d 55. *McGee v. United States*, ... U.S. ..... [May 17, 1971, 39 U.S.L.W. 4571] is not at variance with these sentiments. In *McGee* the Court was faced with a non-cooperating registrant who refused to fill out forms, and declared that he would not cooperate with the local board. By contrast, in *Taylor, Edwards*, supra, and similar misinformation cases we have cooperative registrants willing to work with local boards to receive the classification to which the law entitles them, who instead find themselves thwarted in that effort by misleading advice from the Selective Service System itself.

There is no indication in the record in this case that Taylor's beliefs are not sincerely held sufficiently to qualify for conscientious objector status under *Welsh* and *Seeger*. His conviction is allowed to stand, however, because he did not timely assert his CO claim. The blame for this tragic set of circumstances should fall squarely on officials of the Selective Service System. I would like to see a holding that the unreasonable actions of the Selective Service System denied to Jape Holley Taylor that due process of law to which he was constitutionally entitled. This conviction should not stand.

UNITED STATES of America,
Appellee,
v.
John E. FARGNOLI, Defendant-
Appellant.

UNITED STATES of America,
Appelee,
v.
Joseph R. FARGNOLI, JR., Defendant-
Appellant.
Nos. 71-1369, 71-1370.

United States Court of Appeals,
First Circuit.
Argued March 7, 1972.
Decided April 25, 1972.

COFFIN, Circuit Judge.

Appellants John and Joseph Fargnoli were convicted in jury-waived trials, 332 F.Supp. 1122, 1125, of refusing to submit to induction in violation of 50 U.S.C. App. § 462(a). Each argues that he was at the time of refusing induction, John on November 6, 1968, and Joseph on January 15, 1969, a "non-religious" conscientious objector entitled to be placed in Class I-O under a retroactive application of Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1972, 26 L.Ed.2d 308 (1970). Although neither presented his claim of conscientious objection to his local board until long after having refused induction, appellants urge that failure to make timely request for the classification should

be excused on the ground that not until *Welsh* was the classification available to one whose beliefs were "non-religious."

[1] We think it clear that *Welsh* should be given fully retroactive application. Shortly after its decision in *Welsh, the* Supreme Court remanded for further consideration in light of *Welsh* four cases in which the defendants had refused induction and in which conviction had been affirmed by courts of appeals before *Welsh*. Morico v. United States, 339 U.S. 526, 90 S.Ct. 2230, 26 L.Ed.2d 776 (1970). *See also* Ramos v. United States, 319 F.Supp. 1207, 1216 (D.R.I.1970). Congress has made it a crime to refuse to obey a valid order to report for induction. The very definition of the crime turns upon the validity of the order to report and, in turn, upon the validity of the registrant's classification. To accord *Welsh*, which interpreted the bounds of a classification, other than fully retroactive effect would be to make what was not a crime for one registrant a crime under the same statute for another registrant with the same beliefs. *Cf.* United States v. United States Coin and Currency, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 433 (1971). Under the circumstances, we do not think it necessary or appropriate to discuss the criteria for retroactivity enunciated in Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965), criteria developed to govern the retroactivity of constitutional decisions regarding criminal procedure and susceptible only of tortured application here.

The second step in appellants' argument is that despite the general rule requiring exhaustion of administrative remedies, *see, e. g.*, Estep v. United States, 327 U.S. 114, 66 S.Ct 423, 90 L.Ed. 567 (1946); United States v. Quattrucci, 454 F.2d 57 (1st Cir. 1972); United States v. Pringle, 438 F.2d 1216 (1st Cir. 1971), their failure to

make timely application to the board is no bar to their now raising claims of conscientious objection. As the Supreme Court has indicated, the general rule is based upon the statutory policy of permitting the Selective Service System "to make a factual record, or to exercise its discretion or apply its expertise." McKart v. United States, 395 U.S. 185, 194, 89 S.Ct. 1657, 1663, 23 L.Ed.2d 194 (1969). In *McKart*, the Court excused the registrant's failure to appeal the denial of a sole surviving son classification, finding the policy inapposite where the Selective Service System's settled interpretation of the statute would have made exhaustion futile By the same token, the claim of conscientious objection was held in McGee v. United States, 402 U.S. 479, 490, 91 S.Ct. 1565, 29 L.Er.2d 47 (1971), to be a fact-laden matter as to which a registrant must exhaust administrative remedies

We do not read *McGee* as teaching that exhaustion must rigidly be required in all conscientious objector cases. In particular, McGee's claim appears to have satisfied, prima facie, the requirements of the classification as then interpreted by the Selective Service System. His defense did not rest upon the overturning of an official administrative interpretation of the statute.

It might be argued, although the government did not do so, that *Welsh* was a mere reiteration of United States v. Seeger, 380 U.S. 163, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965). Such a position would find some support in the plurality opinion in *Welsh*, which draws parallels between the two cases. Welsh v. United States, *supra*, 398 at 337, 90 S.Ct. 1792. But Justice Harlan, who concurred on constitutional grounds, and the three dissenting justices did not think the case controlled by *Seeger*. For present purposes, in any event, a sufficient answer to the argument that *Welsh* was a foregone conclusion is the position of

the Selective Service System prior to the decision:

> "To be entitled to a classification as a conscientious objector, the registrant's objection to military service must be by reason of religious training and belief. The definition of 'religious training and belief' comports with a standard or accepted understanding of the meaning of religion in American society . . . . However, the use of the word ['religion'] in connection with the selective service law was not intended to be inclusive of morals, or of devotion to human welfare or of policy of government . . . ." [Footnotes omitted.] L. Hershey, D. Omer & E. Denny, Legal Aspects of Selective Service 12 (1969 ed.) (manual for government appeal agents).

On July 6, 1970, shortly after *Welsh* was decided, the Selective Service System issued Local Board Memorandum No. 107, which stated in part that

> "The term 'religious training and belief' as used in the law may include solely moral or ethical beliefs, even though the registrant himself may not characterize these beliefs as 'religious' in the traditional sense, or may expressly characterize them as not 'religious.'"

The contrast between the two statements is striking—the former is a begrudging version of *Seeger* while the latter is a straightforward acceptance in ordinary language of *Welsh*. However a court might view the progression from *Seeger* to *Welsh*, local boards could not fail to recognize a sharp disjunction between the Director's pre- and post-*Welsh* guidelines. *Cf.* Ramos v. United States, *supra*, 319 F.Supp. at 1214-1215.

It might further be argued that even if exhaustion, in the ordinary sense of the taking of an appeal from an

adverse decision of a local board, was not required, the appellants were at least under a duty to submit their claims to the local board. Regarding a claimed ministerial exemption, which had not been presented to the local board, the Court in *McGee* stated that

> "The exhaustion requirement is properly imposed where, as here, the claim to exemption depends on careful factual analysis and where the registrant has completely sidestepped the administrative process designed to marshal relevant facts and resolve factual issues in the first instance." 402 U.S. at 488, 91 S.Ct. at 1571.

But since McGee did not challenge a settled administrative standard, we do not construe the Court's language as deciding the present case. In *McKart,* where the registrant did challenge an administrative interpretation of the statute, the Court left open whether he could have mounted that challenge if he had not pressed his claim to the board. 395 U.S. at 198 n. 15, 89 S.Ct.1657, In one sense, appellants here have a stronger case for excusing failure to present their claims, in that they seek only to take advantage of another's successful challenge rather than themselves to initiate the challenge. Considerations which would counsel a court not to upset an administrative interpretation in the absence of a full record do not apply when the interpretation has already been thrown out.

[2] In our view, the issue must turn on the clarity of the rejected interpretation and the extent of the change wrought by its replacement. Under the Selective Service policies sketched above, we think it manifest that a "nonreligious" claim would have been rejected prior to *Welsh* and that for registrants with such beliefs *Welsh* was a dramatic change. Accordingly, we hold that a registrant who can demonstrate that at the time of refusing induc-

tion he held beliefs which did not qualify under then-existing law but do qualify under *Welsh* is not barred from raising that claim by failure to have presented the claim to his local board.

The government argues vigorously that even if the law is as we hold it to be, neither of the appellants in these cases may avail himself of it. In the government's view, John was at best a selective objector, and Joseph, a religious objector, at the time of refusing induction. The district court, having relied on the exhaustion doctrine, made no finding on this point. We do not think it appropriate to rule in the first instance and express no views. Of the two possibilities for remand, the local board and the district court, neither is entirely satisfactory. Were the relevant question the present views of the appellants, we would of course remand to the local board because of its expertise. But we think the compulsory process and adversary format of the district court would be useful in ascertaining state of mind at an earlier time. And since the inquiry will not be made for the purpose of determining availability for service but solely for the purpose of adjudicating criminal liability, a remand to the local board would distract the board from its ongoing responsibilities.

[3] Accordingly, as to each of the appellants, we remand to the district court for a determination whether, at the time he refused induction, his beliefs were such as to entitle him to classification as a conscientious objector under the *Welsh* standard but not under the prior standard. A finding in the appellant's favor will both excuse his failure to exhaust and constitute a defense to the criminal charge, in which case the appellant shall be acquitted. A finding against the registrant will either make the exhaustion doctrine apposite or the defense of improper classi-

ficaion inadequate, in which case the conviction shall be affirmed. The burden of proof shall be the civil burden of preponderance of the evidence and shall rest upon the registrant. Placing the burden on the government would be unfair to other registrants who in presenting claims to their local boards are subject to 32 C.F.R. § 1623.2:

> "Every registrant shall be placed on [sic] Class I-A . . . except that when grounds are established to place a registrant in one or more [other classes], the registrant shall be classified in the lowest class for which he is determined to be eligible . . . ."

Appellant Joseph, who submitted a claim for classification as a conscientious objector after having refused induction, makes the additional argument that the local board considered and rejected his application on the merits, without reopening, in violation of the command of Mulloy v. United States, 398 U.S. 410, 90 S.St. 1766, 26 L.Ed2d 362 (1970). *Mulloy* concerned a reopening prior to refusal to submit to induction, but even were that doctrine extended to cover the present case, it would be no defense, United States v. Pringle, 438 F.2d 1216, 1217 (1st Cir. 1971), unless appellant were to prevail on his primary claim that the order to report for induction was invalid. In that eventuality, he would have no need for a second defense.

Judgments vacated; cases remanded for further proceedings consistent with this opinion.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1641

GEOFFREY MICHAEL AVERY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The issue presented is whether in the circumstances of this case petitioner's failure to present his claim for conscientious objector classification to his local board precludes him from challenging the validity of his induction order in a prosecution for failing to report for induction.

Following a non-jury trial before the United States District Court for the Middle District of Florida, petitioner was convicted of willfully refusing to report for induction, in violation of 50 U.S.C. App. 462(a). He was sentenced to six months' imprisonment, followed by a suspended sentence of two years conditioned upon the satisfactory performance of alternative civilian work. The court of appeals affirmed in a *per curiam* opinion (Pet. App. A1-A2).

The relevant facts are set forth in the district court's findings of fact and conclusions of law (Pet. App. A6-A8). Petitioner registered with local Board No. 30, St. Petersburg, Florida, upon reaching his eighteenth birthday in 1968. Following registration, he returned a Classification Questionnaire to his local board (SSS Form 100), in which he indicated that he was a full time college student. He did not respond to a series of questions which would have indicated to the local board that he considered himself a conscientious objector and that he wished to be provided with the appropriate form (SSS Form 150) by which he might apply for exemption.

On September 24, 1968, he was classified II-S. He held this classification until December 9, 1969, when, following his withdrawal from Duke University and in the absence of any information on file or any request for alternative classification, the board reclassified him I-A, available for induction. Petitioner was ordered to report for induction on May 6, 1970. The present indictment and conviction followed petitioner's failure so to report.

Petitioner here challenges his conviction on the ground that he was improperly denied classification as a conscientious objector. Although he never applied for such classification and never sought assistance in applying therefor, he alleged in the courts below that the "Classification Questionnaire" (SSS Form 100) contained misleading information regarding his right to present to his local board a claim for classification as a conscientious objector. The form made provision for a registrant to assert such claim by reasons of his "religious training and belief," the exact language employed in the Selective Service Act (50 U.S.C. App. 456(j)).

Petitioner claimed that his conscientious objection to war was not based on religious grounds but on moral and ethical considerations. Accordingly, he argued that his failure to present his claim to the local board was due to the erroneous information given him and should not preclude a challenge to the validity of the induction order. The claim that the information was misleading is based on the construction of 50 U.S.C. 456(j) in *Welsh* v. *United States*, 398 U.S. 333, decided *after* petitioner failed to report for induction.[1] Petitioner alleged that under *Welsh* he would be entitled to classification as a conscientious objector.

The district court and the court of appeals, relying on *United States* v. *Taylor*, 448 F. 2d 349 (C.A. 5), certiorari denied, 404 U.S. 1024 rejected petitioner's claim. In *Taylor*, the court of appeals, rejecting a claim similar to that raised by petitioner below, wrote (Pet. App. A14, A13):

> Under the facts and in the circumstances of this case, we are convinced that Taylor acted unreasonably. Taylor testified that he interpreted the language of the form to mean that some formal or conventional religious basis was required for a conscientious objector classification, yet he made no real effort to ascertain the actual requirements for the classification despite the ready availability of information and advice at the local board. * * * [W]e take judicial notice of the fact that a registrant's Notice of Classification, which is required to be in his personal possession at all times, plainly advises

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[1] Petitioner first asserted his claim in a motion to dismiss the indictment two years after his refusal to report for induction and a year after indictment (Pet. App. A8).

registrants in capital letters—"For Information and Advice, Go To Any Local Board." Other provisions advise registrants of the availability of Government Appeal, of board members ready "to advise and assist registrants in the preparation of questionnaires and other selective service forms," and of the "positive information policy" of the Selective Service Board.

* * * * *

* * * It is true that SSS Form 150 does not mention or suggest the very broad construction of the requirements for conscientious objector religious requirements as interpreted by the Supreme Court in *United States* v. *Welch*, and *United States* v. *Seeger*. In this regard it could be argued that the old Form 150 possibly did leave some questions unanswered. Nevertheless, the evidence in this case in undisputed that appellant acting unilaterally decided on uncounselled, subjective information that he could not qualify. Although cases exist where misleading government activity or information constitutes a good defense to a criminal charge, more is required than a bald assertion that the defendant was as a subjective matter misled, and that his subsequent action resulted from his mistaken belief. [footnotes omitted].

This holding, we submit, is correct. There can be no serious claim that the local board—in using language employed by Congress in defining a person eligible for conscientious objector classification—intentionally misled petitioner, particularly where petitioner never sought any guidance as to applicable standards. As the Court of Appeals for the First Circuit held in *United States* v. *Powers*, 413 F. 2d 834, 837: "Were unilateral, subjective, uncounselled misunderstanding of Selective

Service requirements and definitions to be a defense to prosecution, an already laboring vehicle would in all likelihood be completely immobilized." See also *United States* v. *Yoha*, 445 F. 2d 816 (C.A. 9).

This principle is clearly applicable to petitioner here, since he does not and cannot dispute the finding of the district court that he "made a unilateral determination without consultation with anyone that he did not qualify for I-O status under pre-*Welsh* standards" (Pet. App. A7-A8).

On facts not materially different from those here, however, the Court of Appeals for the First Circuit held that the failure of a registrant to present his claim for conscientious objector classification to his local board prior to *Welsh* did not bar him from challenging the validity of the classification. *United States* v. *Fargnoli*, 458 F. 2d 1237 (C.A. 1) (Pet. App. A28-A34). The court of appeals there held that *Welsh* v. *United States*, *supra*, should be applied retroactively, and that the failure of the registrant to make a claim which would surely have been rejected should not preclude the registrant from challenging the validity of the order (Pet. App. A32-A33):

> In our view, the issue must turn on the clarity of the rejected interpretation and the extent of the change wrought by its replacement. Under the Selective Service policies sketched above, we think it manifest that a "non-religious" claim would have been rejected prior to *Welsh* and that for registrants with such beliefs *Welsh* was a dramatic change. Accordingly, we hold that a registrant who can demonstrate that at the time of refusing induction he held beliefs which did not qualify under then-

existing law but do qualify under *Welsh* is not barred from raising that claim by failure to have presented the claim to his local board.

For the reasons stated above, we believe the decision below and the decision in *Taylor* are correct. We recognize that in *Fargnoli*, a factually indistinguishable case, the First Circuit reached the opposite result by pursuing a different and, in our view, erroneous legal theory. Normally, a conflict between circuits might lead us not to oppose the grant of certiorari and we have considered that course in this case. Here, however, the issue can only affect pre-1970 cases and—unlike the situation in *Musser* and *Waldron*, Nos. 72-1733 and 72-6748—we do not believe that a substantial number of persons will be affected if the conflict remains unresolved. Accordingly, we oppose the grant of certiorari.

If the Court should determine to review the case, however, we suggest, given the circumstances, that summary disposition would not be inappropriate. That is not, of course, the Court's normal practice. But, here, with respect to an uncomplicated question, the resolution of which will establish no lasting precedent, plenary consideration with oral argument may not be warranted. For our part, we are content to rest on the opinion in *Taylor*, supplemented by the present memorandum. Petitioner may, of course, file a reply brief if he chooses.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09

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Supreme Court of the United States

October Term, 1973

No. 72-1641

GEOFFREY MICHAEL AVERY,
Petitioner,

- versus -

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

ON PETITION FOR A WRIT OF CERITORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITIONER'S REPLY BRIEF

I

The Solicitor General agrees that the Fifth Circuit's affirmance of petitioner's conviction in this case directly conflicts with the First Circuit's decision in *Fargnoli,* in which a conviction was reversed "[o]n facts not materially different from those here" (Resp. brief, page 5). Nevertheless the government opposes a grant of certiorari. Petitioner's sentence includes imprisonment. One of the reasons Congress vested certiorari jurisdiction in this Court, no doubt, was so that a man's freedom would not depend upon where in the United States he happened to live. A grant of certiorari to prevent this result is clearly indicated.

Going to the merits as a further basis for its contention that certiorari should not be granted, the government argues that the Fifth Circuit's position in this conflict is the correct one (page 6), thereby inviting this Court to dispose of the case on the merits without appearing to do so. If the Court is thus to reach the merits, there is no reason why its judicial labor should not be recognized by the regular procedure of a grant of certiorari followed by the publication of its decision on the merits. Therefore, certiorari should be granted.

II

With regard to the merits, to which the government has addressed itself, the critical point generating the conflict between the Circuits is included in that portion of the First Circuit's opinion which the government has quoted (page 5). It reads:

> ". . . we think it manifest that the 'non-religious' claim would have been rejected prior to *Welsh* . . ." (A-32)

It is this issue—whether or not a purely moral and ethical ("non-religious") claim would have been rejected prior to *Welsh*—which the Fifth Circuit failed to identify and decide, although petitioner's claim was a pre-*Welsh*, purely moral and ethical claim. Instead the Fifth Circuit, both in this case and its prior decision in *Taylor*, erroneously assumed that if the defendant had asked his local draft board prior to *Welsh* whether or not the statutory phrase "religious training and belief" included purely moral and ethical ("non-religious") beliefs, the draft board would have advised him that it did. This is manifest from the portion of the opinion in *Taylor* quoted (page 3) by the government, and reading:

> "Taylor . . . made no real effort to ascertain the actual requirements of the classification despite the ready availability of information and advice at the local board." (A-14)

In fact, as is hereafter discussed in Part "III", the local draft boards of the country did not know the "actual requirements of the classification" and the "advice" which they had been instructed to give was incorrect.

In the record in this case (Defendant's Exhibit No. 2. There is no transcript and hence no page number.), as in the record in *Fargnoli*, there is a statement of the pre-*Welsh* position of the Selective Service System authored by General Lewis B. Hershey, its director at that time. The First Circuit court in *Fargnoli* quoted a part of that statement as follows:

> "To be entitled to a classification as a conscientious objector, the registrant's objection to military service must be by reason of religious training and belief. The definition of 'religious training and belief' comports with a standard or

> accepted understanding of the meaning of religion in American society . . . . However, the use of the word ['religion']in connection with the selective service law was not intended to be inclusive of morals, or of devotion to human welfare or of policy of government . . . ." [Footnotes omitted] L. Hershey, D. Omer & E. Denny, Legal Aspects of Selective Service 12 (1969 ed.) (manual for government appeal agents). (A-31)

From this the First Circuit correctly concluded that under pre-*Welsh* Selective Service policy, a claim for conscientious-objector classification on purely moral and ethical ("non-religious") grounds "would have been rejected" by a local board and that "for registrants with such beliefs *Welsh* was a dramatic change" of which they were entitled to take advantage retroactively (A-32), and granted relief accordingly. The Fifth Circuit, on the other hand, failing to consider this issue, held Taylor and petitioner each criminally responsible because he did not timely claim an exemption which his local draft board was not then authorized to grant.

The Court below erroneously relied upon the *Welsh* and *Seeger* (United States v Seeger, 380 US 163 (1965)) decisions as a basis for its assumption that if Taylor had consulted his local draft board he could have learned "the true status of his claim." (A-15). The court overlooked the fact, however, that in 1969 when Taylor made his decision (A-11), and in 1968 when petitioner Avery made his decision (A-8), *Welsh* (1970) had not been decided. *Seeger* had been on the books since 1965, but the court also overlooked the fact that it was the position of the Selective Service System that the 1967 Amendment to the draft law had negated any effect *Seeger* otherwise

might have had on this issue. (Defendant's Exhibit No. 2, Hershey, "Legal Aspects of Selective Service," para 14, pp 12-14; Defendant's Exhibit No. 5, Tarr, Curtis W., "Selective Service and Conscientious Objectors," ABA Journal, Vol 57, October, 1971 p 977, 978-9). The *Fargnoli* court, on the other hand, correctly noted that the Selective Service System had disregarded *Seeger* on this issue (A-31) and that the "dramatic change" did not occur until 1970 in *Welsh* (A-32).

III

This case, like *Taylor* before it in the Fifth Circuit and *Fargnoli* in the First Circuit, results from what might be characterized as a judicial gloss upon, if not a judicial alteration of, the meaning of the words "religious training and belief." This gloss, or alteration, was made in *Welsh* for constitutional reasons therein set forth. Indeed, as the First Circuit's previously quoted language indicates, that court concluded in *Fargnoli* that the definition of the word "religious" had been so expanded by *Welsh* as to include subject matter previously considered "non-religious." This was the result predicted by Mr. Justice Harlan in his concurring opinion in *Welsh* when he stated:

> "Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions and . . . cults that represent schools of thought."
> Welsh v United States, (1970) 398 US 333 at 354, 26 L Ed 2d 308 at 326.

It is noteworthy that Welsh himself understood the limiting effect of the word "religious" and achieved his legal victory by striking out from his Selective Service application form the words "my religious training and" so that it read "I am, by reason of ~~my religious training and~~ belief, conscientiously opposed to participation in war in any form." *Welsh,* US text 336-7, L Ed text at 317. By reversing his conviction for constitutional reasons this Court in effect declared that Welsh had correctly disregarded the word "religious" as "so plastic in meaning . . . that any asserted and strongly held belief satisfies its requirements." (Harlan, J., US text at 452, L Ed text at 325-6). Mr. Justice Black, speaking for himself and three other members of the Court stated:

> "But very few registrants are fully aware of the broad scope of the word 'religious' as used in §6(j), and accordingly a registrant's statement that his beliefs are non-religious is a highly unreliable guide for those charged with administering the exemption."
> US text at 341, L Ed text at 319-20

Thus petitioner, Taylor, Fargnoli (more accurately, the Fargnoli brothers, John and Joseph), General Hershey and Welsh all understood from the plain meaning of the words that the statutory phrase "religious training and belief" literally excluded purely moral and ethical claims from the conscientious objector classification. The dissenting opinion in *Welsh* in which the Chief Justice, Justice White and Justice Stewart joined, stated flatly that the decision

> ". . . exempts from the draft a class of persons to whom Congress has

expressly denied an exemption . . ."
US text 368, L Ed text 334.

It is ironic that petitioner, like Taylor before him, should be in his present predicament, not from ignoring the instructions of his local draft board, but from having relied upon its printed forms as being correct, when, as Welsh demonstrated, they did not mean what they said.

There are some cases, as the government argues (pp 4-5), where a registrant properly has been denied relief because his interpretation of a requirement was different from that of the Selective Service System and he elected to act upon his own interpretation without ascertaining that the system had a different one. Petitioner's case and *Taylor* and *Fargnoli* are not cases of a mistake in interpretation. They are cases where the plain meaning of the law was changed to include a class of conscientious objectors unconstitutionally excluded under the law as written. The First Circuit court in *Fargnoli* recognized this distinction and on this basis correctly reached a result opposite from that reached by the Fifth Circuit.

CONCLUSION

Certiorari should be granted. On the merits, the First Circuit decision in *Fargnoli* correctly analyzed and decided the issue involved in these cases. The decision below is unsound in law and unfair in result and should be reversed.

Respectfully submitted,
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